Stemming the Tide: Texas's Demographic Change, the Voting Rights Act, and the Emerging Importance of *Bartlett v. Strickland*

By Matthew Drecun*

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INTRODUCTION

The population of Texas is growing rapidly, and nearly all of that growth is occurring in its cities and among its racial and ethnic minori-

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ties.[1] When the 2020 Census registers that growth, it will show the steady increase in minority groups in many of Texas's legislative districts.[2] This demographic change will challenge mapmakers seeking to preserve the partisan and racial structure of Texas's current district maps. However, those mapmakers will be able to go about their work after the 2020 Census with minimized interference from the Voting Rights Act (VRA).

Much discussion has centered on the Supreme Court's landmark decision in *Shelby County v. Holder*,[3] which lifted the requirement of Section 5 of the VRA that Texas submit its redistricting maps for the federal government's approval.[4] Another Supreme Court decision, *Bartlett v. Strickland*,[5] also warrants attention because it will impose important limits on the role played by Section 2 of the VRA.[6]

Bartlett held that Section 2 does not protect a minority group's voting strength unless and until its members can "elect [a] candidate based on their own votes and without assistance from others."[7] Previously, however, in *LULAC v. Perry*,[8] the Supreme Court held that Section 2 prohibited mapmakers from "cracking" apart a minority group that was poised to become a controlling majority in its district.[9] Consequently, by 2020, minority groups in many of Texas's legislative districts are likely to find themselves in a no-man's-land—too small for *LULAC*'s protection but growing too large too quickly to be fairly dismissed under *Bartlett*. Under the apparent rule of *Bartlett*, they face the risk that state mapmakers will curtail the growth of their voting strength.[10] The redraw-

[1] Steve H. Murdock et al., Changing Texas: Implications of Addressing or Ignoring the Texas Challenge 24 (2014).

[2] *See* Texas State Data Center, Office of the State Demographer, Texas Population Estimates and Projections Program Overview (2015), http://osd.texas.gov/Data/TPEPP/ [http://perma.cc/6HEL-HGLV]. Steve Murdock—see *supra* note 1—is the former State Demographer. His research center at Rice University, the Hobby Center for the Study of Texas, continues to collaborate with the Texas State Data Center. Murdock, *supra* note 1, at 20.

[3] 133 S. Ct. 2612 (2013).

[4] 52 U.S.C.A. § 10304 (West 2015) (Section 5 applied to specific jurisdictions identified in Section 4. Under Section 5, any change with respect to voting in a covered jurisdiction could not legally be enforced without a determination by a federal district court in D.C. or a submission to the U.S. Attorney General. This required proof that the proposed voting change would not deny or abridge the right to vote on account of race, color, or membership in a language minority group. If the jurisdiction were unable to prove the absence of such discrimination, the change would be legally unenforceable). *See, e.g.*, Nicholas Stephanopoulos, *The South After Shelby County*, 2013 Sup. Ct. Rev. 55 (2013).

[5] 556 U.S. 1 (2009).

[6] 52 U.S.C.A. § 10301 (West 2015); *infra*, Parts II–B and III.

[7] 556 U.S. at 14.

[8] 548 U.S. 399 (2006).

[9] *Id.* at 439–42; *see* Thornburg v. Gingles, 478 U.S. 30, 46 n.11 (1986) (stating that dilution of racial minority group voting strength may be caused by the dispersal of a particular group into districts in which they constitute an ineffective minority of voters).

[10] In *Bartlett*, Justice Souter issued a prescient warning that this problem would emerge. 556 U.S. at 42 n.5 (Souter, J., dissenting) ("North Carolina could fracture and submerge in majority-dominated

ing of these districts after the 2020 Census will have an important impact on Texas's political landscape. With similar demographic changes occurring nationwide,[11] the ramifications of *Bartlett*'s holding will test the continuing vitality of the VRA.

Part I of this note, focusing on Texas's seats in the U.S. House of Representatives, identifies the existing districts subject to the pressures of demographic change and anticipates the parts of the state where new districts will be needed. Part II provides the background to *Bartlett* and analyzes its controlling opinion. Justice Kennedy's plurality opinion in *Bartlett* limited the VRA's mandate, departed from the Section 2 case law, and allowed the concerns about race-conscious districting expressed in *Shaw v. Reno*[12] and subsequent cases to control the interpretation of the VRA.[13] Part III then addresses two issues left in the wake of *Bartlett*: first, whether there is still a way for Section 2 to prevent the cracking of a minority group that is not yet a majority in its district but is nearing that point; and second, whether Section 2 applies to minority-coalition districts, in which two or more minority groups form a majority of the district's voting-age population.

I. The Demographic Tide

Texas has a "rapidly growing, racially/ethnically diversifying, and aging population."[14] Robust expansion is nothing new for Texas; it has outpaced the nationwide growth rate in every decade since it became a state.[15] In recent years, Texas's population increase has been particularly exceptional. The state had the largest growth in absolute terms of any state between 2000 and 2010, and between 2010 and 2012.[16]

Importantly, that growth is not uniformly distributed. In seventy-nine of the Texas's 254 counties, the population shrank between 2000 and 2010, and ninety-six shrunk between 2010 and 2012.[17] Meanwhile, its cities have expanded apace.[18] The state's growth has also not been uniformly distributed across racial and ethnic groups. The state was

districts the 12 districts in which black voters constitute between 35% and 49% of the voting population . . . without ever implicating § 2.").

[11] Murdock, *supra* note 1.

[12] 509 U.S. 630 (1993).

[13] *Bartlett*, 556 U.S. at 21.

[14] Murdock, *supra* note 1, at 28.

[15] *Id.* at 17.

[16] *Id.*

[17] *Id.*

[18] *Id.* at 27.

60.6% non-Hispanic white in 1990, 52.4% in 2000, and 45.3% in 2010, and that number continues to fall.[19]

Part I–A explains how the map of Texas's congressional districts changed after the state's growth between 2000 and 2010 earned it four new U.S. House seats. Part I–B anticipates the effects of continuing demographic change on the state's existing districts. Part I–C identifies the regions of the state that should receive new seats after 2020.

A. Redistricting after the 2010 Census

Between 2000 and 2010, Texas added 4.3 million people.[20] Reflecting that population growth, the state was awarded four additional seats in the U.S. House.[21] The state's initial districting maps did not attain preclearance[22] under Section 5 of the VRA, leading to extensive litigation in the federal district court in Washington, D.C.[23] The Supreme Court's decision in *Shelby County v. Holder* mooted this litigation, because it invalidated the coverage formula that subjected Texas to the preclearance process.[24] Nevertheless, the litigation there and by private plaintiffs in the Western District of Texas prompted the adoption of interim maps in 2013.[25] Those interim maps still govern Texas's elections,[26] and as of this writing, litigation against both the interim and original maps continues.[27]

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[19] *Id.* at 17–18.

[20] TEXAS STATE DATA CENTER, OFFICE OF THE STATE DEMOGRAPHER, CENSUS BUREAU CUSTOM REDISTRICTING TABLES FOR TEXAS, Table 1 (2010), http://osd.texas.gov/Data/Decennial/2010/Redistricting [http://perma.cc/6554-SDTV].

[21] Complaint for Declaratory Judgment Pursuant to Section 5 of the Voting Rights Act of 1965 and Request for Three-Judge Court at 3, Texas v. United States, 887 F. Supp. 2d 133 (D.D.C. 2011) (No. 1:11-cv-01303-RMC-TBG-BAH).

[22] *See supra* note 4 and accompanying text.

[23] Texas v. United States, 887 F. Supp. 2d 133, 138 (D.D.C. 2011) (denying preclearance under Section 5 because Texas failed to show its redistricting plans would not have a retrogressive effect, were not enacted with discriminatory purpose, and did not have the purpose or effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group).

[24] 133 S. Ct. 2612, 2619–21, 2631 (2013) (explaining that a jurisdiction would fall within the Section 4 "coverage formula" if the state or political subdivision of the state maintained on November 1, 1968, a "test or device" restricting the opportunity to register and vote, or if the jurisdiction had a voting test and less than 50 percent voter registration or turnout as of 1972); Texas v. United States, 133 S. Ct. 2885 (2013).

[25] Perez v. Texas, 970 F. Supp. 2d 593, 598 (W.D. Tex. 2013) (summarizing the legislative history of the interim plans' adoption during the 2013 legislative session).

[26] Order Denying Plaintiffs' Conditional Motion for Preliminary Injunction, Perez v. Texas, 970 F. Supp. 2d 593 (W.D. Tex. 2015) (No. 11-CA-360-OLG-JES-XR) (denying a motion by five plaintiff groups to enjoin the use of the interim maps while the litigation concerning their challenge to those maps continues).

[27] *See* Perez v. Perry, 26 F. Supp. 3d 612, 621–22 (W.D. Tex. 2014) (holding that the claims against the 2011 plans were not moot). It promises to continue for some time beyond 2016. *See* Order, *supra*

Just like its current growth, Texas's growth between 2000 and 2010 was concentrated in its metropolitan areas[28] and among its racial and ethnic minorities.[29] Nearly 2.8 million of the state's 4.3 million new residents were Hispanic, amounting to 65% of the growth.[30] The non-Hispanic black population grew by 522,000, and the non-Hispanic white population grew by only 464,000, accounting for 12% and 11% of the overall increase, respectively.[31]

Notwithstanding that distribution, three of Texas's four new seats in the U.S. House went to rural and suburban Congressional districts that have consistently elected white Republicans:[32] the Twenty-Fifth District ("the Twenty-Fifth"), held by Roger Williams; the Twenty-Seventh, held by Blake Farenthold; and the Thirty-Sixth, held by Brian Babin.[33] The white[34] voting-age population (VAP) in these new districts was 73.5%, 47.2%, and 69.5%, respectively.[35] The lone new minority opportunity

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note 26, at 1 (preserving the still-disputed interim maps for use in the 2016 election cycle). *See also* Non U.S. Plaintiffs' Joint Motion for Entry of Judgment at 1, Perez v. Texas, 26 F. Supp. 3d 612 (W.D. Tex. Dec. 30, 2016) (No. 5:11-cv-00360-OLG-JES-XR) (requesting that the court end its long delay by entering a final judgment as to the 2011 plans, in order to allow the possibility of relief by the 2018 elections).

[28] Texas State Data Center, *supra* note 20 (reporting 206,512 additional people in Fort Worth, 182,761 in San Antonio, 145,820 in Houston, and 133,828 in Austin). Likewise, the counties containing each of these cities experienced substantial growth. In addition, suburban counties in these metro areas grew significantly, particularly Collin and Denton counties in the Dallas area, Fort Bend and Montgomery counties in the Houston area, and Williamson County near Austin.

[29] Murdock, *supra* note 1.

[30] Texas State Data Center, *supra* note 20 at Table 2.

[31] *Id.*

[32] This naturally raises the issue of partisan gerrymandering, but that is not the focus here, because there is no agreement about how to adjudicate such claims. *See* Vieth v. Jubelirer, 541 U.S. 267, 307–08 (2004) (Kennedy, J., concurring) (holding, in a controlling concurrence, that partisan gerrymandering claims are justiciable but that no "clear, manageable, and politically neutral standards" have yet been found by which to evaluate them).

[33] These districts are "new" in the sense that they did not substantially replicate an existing district from the previous map; they cobbled together territory from several existing districts into a new configuration. The Thirty-Fourth and Thirty-Fifth are new in the sense only that they are higher-numbered. The Thirty-Fourth substantially replicates the old Twenty-Seventh (Cameron County and points north along the Gulf Coast), while the Thirty-Fifth replicates much of the old Twenty-Fifth. It covers the same population cluster in central and eastern Travis County, and it continues to be held by Lloyd Doggett. *Compare* Map of Texas Congressional Districts for the 115th Congress, Texas Legislative Council, U.S. Congressional Districts 115th Congress 2017–18 (2017), http://www.tlc.state.tx.us/redist/pdf/congress/map.pdf [http://perma.cc/G2AX-FQ6V], *with* Map of Texas Congressional Districts for the 110th Congress, Texas Legislative Council, U.S. Congressional Districts, 110th Congress Plan 01440C (2006), http://www.tlc.state.tx.us/redist/pdf/chronology_plans/PLAN01440C.pdf [http://perma.cc/F4XH-M94S]. For election winners, see the Race Summary Reports at Office of the Secretary of State, http://elections.sos.state.tx.us/index.htm [http://perma.cc/YAU8-8DJG].

[34] The Texas State Data Center uses "Anglo," rather than "White." Many data sources also use Hispanic and Latino interchangeably. In the course of this discussion, the terms are used according to the source on which the discussion is then drawing.

[35] Texas Legislative Council, Population and Voter Data with Voter Registration Comparison: Congressional Districts 2 (2015), ftp://ftpgis1.tlc.state.tx.us/DistrictViewer/Congress/PlanC235r202.pdf [http://perma.cc/AG2H-MPF9].

district[36] was the Thirty-Third, which links central Dallas to central Fort Worth and is held by Marc Veasey, a black Democrat.[37]

Before and after the 2011 redistricting, the Twenty-Seventh has had its core in Nueces County, which contains the city of Corpus Christi.[38] The previous district had stretched down the Gulf Coast to Cameron County, where Brownsville is located, coupling predominantly white Nueces County with predominantly Hispanic areas. Consequently, it was represented by Solomon Ortiz, a Hispanic Democrat, for thirteen consecutive terms.[39] However, Farenthold narrowly defeated Ortiz in 2010 to take over the previous Twenty-Seventh.[40] State mapmakers then reoriented the district, combining Nueces County with whiter, rural areas to the north and northwest drawn from the previous Fourteenth, Fifteenth, and Twenty-Fifth Districts.[41]

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[36] This is one term for a district in which a racial minority constitutes a majority of the voting-age population, also known as "majority-minority" districts. They are sometimes also described as "ability districts." *See, e.g.*, Texas v. United States, 831 F. Supp. 2d 244, 253 n.7 (D.D.C. 2011) (explaining the term's origins in the statutory text of Section 5). Not everyone accepts the use of the term "opportunity district." *See, e.g.*, Transcript of Oral Argument at 5, Bush v. Vera, 517 U.S. 952 (1996) (No. 94-805) (Scalia, J.: "Why don't we just call them majority minority districts? I mean, you're entitled to use whatever terminology . . . you can call them, you know, motherhood apple pie districts if you like, but you will be insulting my intelligence every time you say it."), https://www.oyez.org/cases/1995/94-805 [http://perma.cc/ZE8C-5J7P].

[37] Office of the Secretary of State, *supra* note 33.

[38] *See infra* Figure 1.

[39] Texas State Directory Online, Solomon P. Ortiz, Sr. (2015), http://www.txdirectory.com/online/person/?id=17390 [http://perma.cc/V2HE-HTJ4].

[40] Office of the Secretary of State, Race Summary Report: 2010 General Election (2010), http://elections.sos.state.tx.us/elchist154_state.htm [http://perma.cc/8H6Z-3E8V].

[41] Texas Legislative Council, *supra* note 33.

FIGURE 1. THE TWENTY-SEVENTH DISTRICT

Adapted from TEXAS LEGISLATIVE COUNCIL, U.S. CONGRESSIONAL DISTRICTS COURT-ORDERED INTERIM CONGRESSIONAL PLAN PLANC235 (2012), ftp://ftpgis1.tlc.state.tx.us/PlanC235/Maps/ Individual%20Districts/map_C235_25-36.pdf [http://perma.cc/2W4J-RZM5].

Williams's Twenty-Fifth and Babin's Thirty-Sixth Districts were carved out of solidly Republican areas in the central and southeastern parts of the state, respectively.[42] The Twenty-Fifth, starting in western Hays and Travis Counties and running northward almost to Fort Worth, was assembled from portions of the old Eleventh, Seventeenth, and Thirty-First Districts.[43] Only in western Travis County does the new Twenty-Fifth share any territory with the previous district.[44] Similarly, the Thirty-Sixth, running from eastern Harris County east and northeast to the Louisiana border, borrows from the old Second, Eighth, and Fourteenth Districts.[45]

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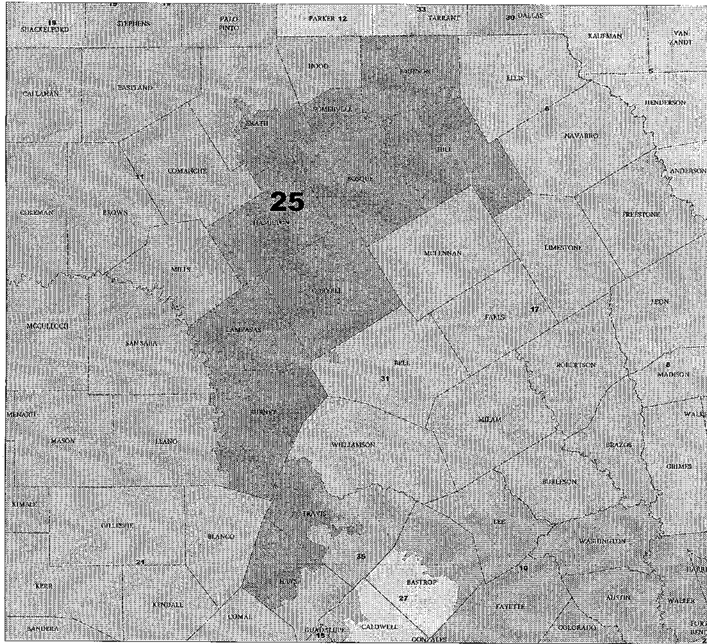
[42] *Id.*

[43] *See infra* Figure 2.

[44] *Id.*

[45] *See infra* Figure 3.

FIGURE 2. THE TWENTY-FIFTH DISTRICT



ADAPTED FROM TEXAS LEGISLATIVE COUNCIL, U.S. CONGRESSIONAL DISTRICTS COURT-ORDERED INTERIM CONGRESSIONAL PLAN PLANC235 (2012), ftp://ftpgis1.tlc.state.tx.us/PlanC235/Maps/ Individual%20Districts/map_C235_25-36.pdf [http://perma.cc/2W4J-RZM5].

Mapmakers were able to create these rural and suburban districts due to the continued growth of suburban counties. For example, Williamson County, north of Austin, added 173,000 people between 2000 and 2010,[46] which allowed the Thirty-First to cede its northern counties to the new Twenty-Fifth.[47] Likewise, the growth in suburban Brazoria and Galveston Counties,[48] near Houston, allowed the Fourteenth to cede its southwestern counties to Farenthold's new Twenty-Seventh.[49] Through these changes, the growth of minority groups in Texas's metropolitan areas served to increase Republican representation of rural and suburban Texans.

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[46] TEXAS STATE DATA CENTER, *supra* note 20.

[47] TEXAS LEGISLATIVE COUNCIL, *supra* note 33 (state maps) (showing the contraction of the Thirty-First to Bell and Williamson Counties, with Coryell, Hamilton, and Erath Counties shifting to the Twenty-Fifth).

[48] TEXAS STATE DATA CENTER, *supra* note 20.

[49] TEXAS LEGISLATIVE COUNCIL, *supra* note 33 (state maps) (showing the shift of Matagorda, Wharton, Jackson, Calhoun, Victoria, and Aransas Counties from the Fourteenth District to the new Twenty-Seventh).

B. Effects of Demographic Change on Existing Districts

After the 2020 Census, the state's mapmakers will have to re-draw the state's congressional districts because U.S. House districts must have precisely equal overall populations.[50] That requirement—coupled with the state's demographic change—will create challenges for mapmakers seeking to preserve the partisan and racial advantages of the current map. In each district discussed below, Republicans will have an incentive to shift minority residents to adjoining districts. Shifting populations in this way will run the risk of claims under Section 2 if large minority communities are "cracked apart"[51] or if minority groups are unduly "packed" into a small handful of districts.[52]

The Office of the State Demographer produces county-level population projections that can help to identify the current districts likely to experience meaningful change by 2020.[53] The discussion below focuses on districts in which Hispanic residents could form a majority of the district's voting-age population (VAP) in 2020, either alone or in a coalition with other minority groups.[54] The State Demographer makes three sets of estimates, based on different projected growth rates: zero migration, migration at half the rate as between 2000 and 2010, and migration at the same rate as between 2000 and 2010.[55] The middle-of-the-road estimate is used below in order to avoid overstating expectations[56] and to

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[50] U.S. CONST. art. I, § 2. *See* Wesberry v. Sanders, 376 U.S. 1, 7–9 (1964) (holding that states with multiple seats in the U.S. House must equalize the overall population of each district).

[51] *See, e.g.*, LULAC v. Perry, 548 U.S. 399, 439–42 (2006).

[52] *See* Voinovich v. Quilter, 507 U.S. 146, 153 (1993) (defining the "packing" variety of vote dilution as "the concentration of [a racial minority] into districts where they constitute an excessive majority") (quoting Thornburg v. Gingles, 478 U.S. 30, 46 n.11 (1986)). *See, e.g.*, Bone Shirt v. Hazeltine, 461 F.3d 1011, 1016 (8th Cir. 2006) (finding a Section 2 violation where a legislative plan heavily concentrated Native Americans in two districts, leaving an adjoining district with a thirty percent Native American population that could never elect its preferred candidate). A new map could also be challenged on equal protection grounds as a "racial gerrymander" if evidence shows that race was the "predominant factor" in mapmakers' line-drawing decisions but that compliance with the VRA did not justify the particular use of race. *See* Alabama Legislative Black Caucus v. Alabama, 135 S. Ct. 1257, 1265 (2015) (articulating the standard for racial gerrymandering claims); *id.* at 1273–74 (allowing that legislators may use race to draw districts when there is a "strong basis in evidence" that compliance with the VRA is thereby achieved). Racial gerrymandering claims are not the focus of this note, though the intersection of the racial gerrymandering and Section 2 bodies of jurisprudence is considered at length, *infra*, Part II–B.

[53] MURDOCK, *supra* note 2.

[54] The focus of this discussion is on voting-age population, not total population, because successful claims of minority vote dilution under Section 2 of the VRA require the demonstration that a compact group of minority voters could form a majority in a single-member district. Bartlett v. Strickland, 556 U.S. 1, 11–14 (2009); *Gingles*, 478 U.S. at 50.

[55] The three key variables in population projections are fertility, mortality, and migration. Migration forecasting engenders the most uncertainty; hence, the three different scenarios. MURDOCK, *supra* note 1, at 20.

[56] Slowing Hispanic population growth since 2007, relative to the preceding seven years, suggests that a somewhat more conservative estimate is the wise course. RENEE STEPLER & MARK HUGO LOPEZ, PEW RESEARCH CENTER, U.S. LATINO POPULATION GROWTH AND DISPERSION HAS SLOWED

account for the fact that foreign-born individuals lacking citizenship account for much of Texas's population increase.[57]

Demographic change in Harris County will affect the Second and Seventh Districts, currently held by Republicans Ted Poe and John Culberson, respectively.[58] The Second runs from the county's northeast corner along its northern edge and down the northwest side of Houston, while the Seventh starts on Houston's west side and curls up to the northwest to meet the Second.[59] In 2010, the Second's VAP was 27.3% Hispanic and 9.6% black, forming a combined 36.5%.[60] The Seventh's VAP was comparable: 27.0% Hispanic and 11.6% black, making up 38.1%.[61] Through 2020, the white population of Harris County is projected to shrink, while its minority populations will grow substantially.[62] Depending on the location of these changes, a coalition of black and Hispanic residents could approach a majority in both districts.

SINCE ONSET OF THE GREAT RECESSION 5 (2016), http://www.pewhispanic.org/files/2016/09/PH_2016.09.08_Geography.pdf [http://perma.cc/22J6-UNTL].

[57] *See* Kaiser Family Foundation, *State Health Facts: Population Distribution by Citizenship Status*, THE KAISER FAM. FOUND. (2015), http://kff.org/other/state-indicator/distribution-by-citizenship-status/ [http://perma.cc/ETQ5-P2T7] (estimating that non-citizens comprised 11% of Texas's population in 2015); RANDY CAPPS ET AL., MIGRATION POLICY INSTITUTE, A PROFILE OF IMMIGRANTS IN HOUSTON, THE NATION'S MOST DIVERSE METROPOLITAN AREA 7 (2015), http://www.migrationpolicy.org/sites/default/files/publications/HoustonProfile.pdf [http://perma.cc/Z5H7-WLRS] (explaining that the "low citizenship rate of Houston's immigrants—and of Latinos in particular—reduces their political power and civic participation").

[58] TEXAS LEGISLATIVE COUNCIL, *supra* note 33 (114th Congress Map).

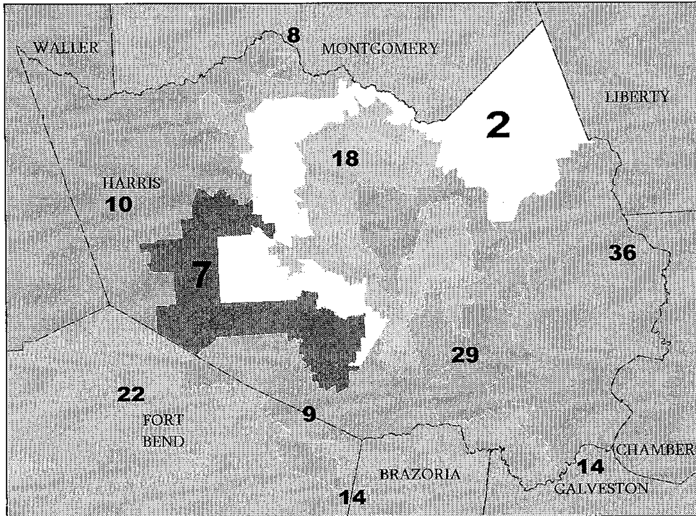
[59] *See infra* Figure 4.

[60] TEXAS LEGISLATIVE COUNCIL, *supra* note 35, at 1. The combined black and Hispanic percentage of the population is slightly less than the sum of the two groups' separate percentages, because some individuals identify as both black and Hispanic. TEXAS LEGISLATIVE COUNCIL, DATA FOR 2011 REDISTRICTING IN TEXAS 3 (2011), http://www.tlc.state.tx.us/redist/pdf/Data_2011_Redistricting.pdf [http://perma.cc/FLX9-FVQB].

[61] *Id.*

[62] TEXAS STATE DATA CENTER, OFFICE OF THE STATE DEMOGRAPHER, 2014 TEXAS POPULATION PROJECTIONS BY MIGRATION SCENARIO DATA TOOL, http://osd.texas.gov/Data/TPEPP/Projections/Tool [http://perma.cc/6U6L-5SVZ] (search run by county, comparing 2010 and 2020, based on "1/2 2000–2010" migration rate, for ages 18–85+, all races and ethnicities selected). All population projections in this section come from this tool.

FIGURE 3. THE SECOND AND SEVENTH DISTRICTS



Adapted from TEXAS LEGISLATIVE COUNCIL, U.S. CONGRESSIONAL DISTRICTS COURT-ORDERED INTERIM CONGRESSIONAL PLAN PLANC235 (2012), ftp://ftpgis1.tlc.state.tx.us/PlanC235/Maps/PlanC235_MapPacket_Legal-Sized.pdf [http://perma.cc/XZN3-6KAZ].

TABLE 1. VOTING-AGE POPULATION GROWTH BY RACE (HARRIS COUNTY)

County	2010 VAP	2020 VAP	Overall Growth	Anglo Growth	Black Growth	Hispanic Growth
Harris	2,944,624	3,464,177	519,553	-20,459	81,264	384,159

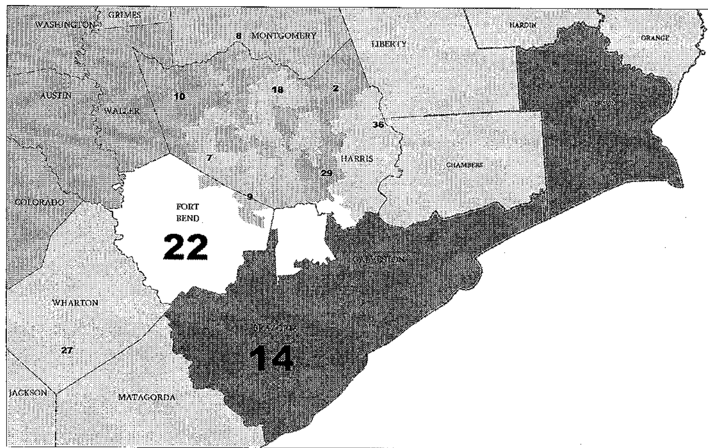
Data obtained from TEXAS STATE DATA CENTER, OFFICE OF THE STATE DEMOGRAPHER, 2014 TEXAS POPULATION PROJECTIONS BY MIGRATION SCENARIO DATA TOOL, http://osd.texas.gov/Data/TPEPP/Projections/Tool [http://perma.cc/6U6L-5SVZ] (search run by county, comparing 2010 and 2020, based on "1/2 2000–2010" migration rate, for ages 18–85+, all races and ethnicities selected). Data from Tables 2-5 also comes from this source using this method.

To protect the Second, mapmakers could shift the growing Hispanic population into the adjoining Eighth or Thirty-Sixth, where the 2010 VAP's were only 16.7% and 18.0% Hispanic, respectively.[63] Shifting Hispanic residents to the adjoining Twenty-Ninth, held by Gene Green, is unlikely because that district's VAP was already 72.7% Hispanic in 2010.[64] This would be vulnerable to a "packing" claim under Section 2. Likewise, protecting the Seventh will be difficult. Shifting black or Hispanic residents to Al Green's Ninth or Sheila Jackson Lee's Eighteenth will also risk a "packing" claim, while the adjoining Republican seats—the Second, Tenth, and Twenty-Second—also have growing minority populations.[65]

[63] TEXAS LEGISLATIVE COUNCIL, *supra* note 35, at 1.
[64] *Id.*
[65] *See id.*

The Fourteenth District, represented by Republican Randy Weber, encompasses all of Jefferson and Galveston Counties and most of Brazoria County.[66] Based on figures from the 2010 Census, the Fourteenth's VAP was 20.3% black and 19.2% Hispanic, forming a combined 39.2% of the VAP.[67] All three counties in the Fourteenth project considerable black and Hispanic population increases but stagnant white growth, which could give minority groups nearly half the district's VAP by 2020.[68]

FIGURE 4. THE FOURTEENTH AND TWENTY-SECOND DISTRICTS



Adapted from TEXAS LEGISLATIVE COUNCIL, U.S. CONGRESSIONAL DISTRICTS COURT-ORDERED INTERIM CONGRESSIONAL PLAN PLANC235 (2012), ftp://ftpgis1.tlc.state.tx.us/PlanC235/Maps/%20Districts/_C235_13-24.pdf [http://perma.cc/CYJ5-JAZY].

TABLE 2. VOTING-AGE POPULATION GROWTH BY RACE (BRAZORIA, GALVESTON, JEFFERSON COUNTIES)

County	2010 VAP	2020 VAP	Overall Growth	Anglo Growth	Black Growth	Hispanic Growth
Brazoria	226,181	276,882	50,701	8,371	9,869	24,086
Galveston	217,142	245,579	28,437	7,559	7,559	14,422
Jefferson	191,875	203,429	11,554	-6,407	4,917	10,335
TOTAL			**90,692**	**9,523**	**22,345**	**48,843**

[66] *See infra* Figure 5.

[67] TEXAS LEGISLATIVE COUNCIL, *supra* note 35, at 1.

[68] *See id.*

Table 3. Voting-Age Population Growth by Race (Fort Bend County)

County	2010 VAP	2020 VAP	Overall Growth	Anglo Growth	Black Growth	Hispanic Growth	Other Groups
Fort Bend	411,540	563,035	151,495	26,448	34,171	49,379	41,497

As with the Second and Seventh, the Fourteenth will be difficult to protect. Its growing minority populations cannot be shifted to the adjoining Twenty-Second or Twenty-Seventh, which are experiencing the same pattern of growth.[69] Mapmakers will likely have to expand the Fourteenth eastward, into the Thirty-Sixth.

The Twenty-Second, held by Pete Olson, contains most of Fort Bend County and small portions of northern Brazoria County and southern Harris County.[70] The 2010 Census reported the district's VAP as 22.3% Hispanic and 12.7% black, making up 34.6% altogether.[71] Because most of the district is in Fort Bend County, that county's demographic shifts will have a much larger impact on the Twenty-Second than the changes in Harris and Brazoria Counties, which are presented in the tables above. The growth of Fort Bend County's other minority groups has also been robust.[72]

Mapmakers will again struggle to protect this district, given the districts that adjoin the Twenty-Second. Shifting minority populations to Al Green's Ninth will risk a "packing" claim under Section 2, while shifting those populations to the adjoining Seventh, Tenth, Fourteenth, or Twenty-Seventh Districts will be counterproductive to the mapmakers' efforts to preserve those as safe Republican seats.

Farther afield from Houston, the Twenty-Seventh[73] is likely to see its Hispanic residents become a clear majority. The 2010 Census recorded the district's VAP as 45.1% Hispanic and 5.6% black, for a combined 50.4%.[74] Nueces County's white population is projected to shrink, while its Hispanic population is projected to grow substantially.[75] This is also true of the district's other population clusters: modest white growth in Caldwell and Bastrop Counties will be outstripped by Hispanic growth

[69] *See id.*

[70] *See supra* Figure 5.

[71] Texas Legislative Council, *supra* note 35, at 1.

[72] The vast diversity of Fort Bend County in terms of race, ethnicity, and national origin is well known and much discussed. *See, e.g.*, Leah Binkovitz, *Fort Bend County's Diversity Confirmed by Survey*, Houston Chronicle, May 1, 2015, http://www.chron.com////-County-still-the-most-diverse-in-6236118.php [http://perma.cc/CQ5U-QSUK]; Corrie McLaggan, *What Ethnic Diversity Looks Like: Fort Bend*, N.Y. Times, Nov. 23, 2013, http://www.nytimes.com///24/us/what-ethnic-diversity-looks-like-fort-bend.html [http://perma.cc/B75T-9XLS].

[73] *See supra* Figure 1.

[74] Texas Legislative Council, *supra* note 35, at 1.

[75] *Id.*

there.[76] Any efforts by mapmakers to counteract the growing Hispanic population in this district will yield a credible "cracking" claim under Section 2.

TABLE 4. VOTING-AGE POPULATION GROWTH BY RACE (BASTROP, CALDWELL, MATAGORDA, NUECES, SAN PATRICIO, VICTORIA, WHARTON COUNTIES)

County	2010 VAP	2020 VAP	Total Growth	Anglo Growth	Black Growth	Hispanic Growth
Bastrop	54,719	67,776	13,057	3,183	826	8,566
Caldwell	28,008	34,386	6,378	1,180	339	4,706
Matagorda	27,031	29,649	2,618	-179	248	2,347
Nueces	251,968	281,357	29,389	-4,593	681	31,066
San Patricio	46,529	51,146	4,617	-256	106	4,532
Victoria	63,616	69,807	6,191	-705	574	5,824
Wharton	30,208	32,604	2,396	-272	219	2,381
TOTAL			**64,646**	**-1,642**	**2,993**	**59,422**

Further west, the Twenty-Third[77]—the subject of lengthy litigation[78] and intense electoral competition[79]—will be under pressure from demographic change at its edges. The VAP was already 65.8% Hispanic in 2010,[80] and that percentage will increase.[81] To the west, the adjoining Sixteenth will not be able to absorb all of El Paso County's population growth. Likewise, to the east, the adjoining Twenty-Eighth cannot absorb all the growth in Webb and Bexar Counties, which include Laredo and San Antonio, respectively.[82]

[76] *See id.*

[77] *See infra* Figure 6.

[78] *See* LULAC v. Perry, 548 U.S. 399, 439–42 (2006).

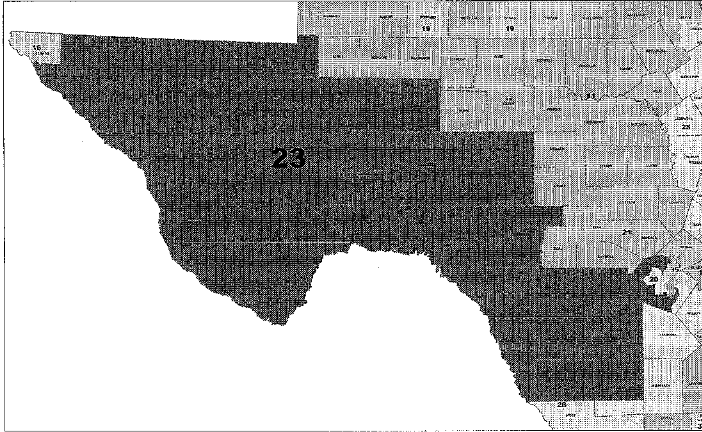
[79] Patrick Svitek & Abby Livingston, *Trump Haunts Hurd, Gallego Congressional Rematch*, THE TEXAS TRIBUNE (Aug. 16, 2016), https://www.texastribune.org/2016/08/16/will-hurd-pete-gallego-ready-fall-battle/ [http://perma.cc/4LEJ-L3FA].

[80] TEXAS LEGISLATIVE COUNCIL, *supra* note 35, at 1.

[81] TEXAS STATE DATA CENTER, *supra* note 2.

[82] TEXAS LEGISLATIVE COUNCIL, *supra* note 33 (114th Congress Map).

Figure 5. The Twenty-Third District



Adapted from Texas Legislative Council, U.S. Congressional Districts Court-Ordered Interim Congressional Plan PLANC235 (2012), ftp://ftpgis1.tlc.state.tx.us/PlanC235/Maps/%20Districts/_C235_13-24.pdf [http://perma.cc/CYJ5-JAZY].

Table 5. Voting-Age Population Growth by Race (El Paso, Webb, Bexar Counties)

County	2010 VAP	2020 VAP	Growth	Anglo Growth	Black Growth	Hispanic Growth
El Paso	559,834	668,280	108,446	-5,709	1,655	109,108
Webb	162,146	208,690	46,544	488	113	45,587
Bexar	1,249,487	1,463,788	214,301	-2,386	14,455	182,009
TOTAL			**369,291**	**-7,607**	**16,223**	**336,704**

Mapmakers cannot shift any residents to the fast-growing Sixteenth and Twenty-Eighth or to Joaquin Castro's Twentieth, also a beneficiary of Bexar County's robust growth.[83] The Eleventh and Twenty-First, Republican seats with comparatively small minority populations,[84] are the logical destination for minority residents. However, efforts to curtail Hispanic residents' increasing dominance of the district's population will surely yield "cracking" claims under Section 2 once again.

Demographic change also has the potential to remake districts in central Texas (the Fifth, Tenth, Seventeenth, and Thirty-First), west Texas (the Eleventh and Nineteenth), and the Dallas–Fort Worth area (the Sixth, the Twenty-Fourth, and the Thirty-Second). In each, the black and Hispanic residents combined to form at least 30% of the VAP in

[83] *Id.*

[84] *See* Texas Legislative Council, *supra* note 35, at 1.

2010,[85] so there is the potential for a minority coalition to comprise a majority of the VAP, if not in 2020, then soon thereafter.

C. Projecting New Districts

Midway through the decade, Texas has continued to outpace the rest of the country in population growth,[86] maintaining its trajectory toward additional seats in the U.S. House after the 2020 Census.[87] The State Demographer's growth projections for metropolitan areas can help identify where additional representation will be warranted. In the preceding section, voting-age population was the focus because Section 2 claims, as explained below, concern numbers of potential voters, not overall population.[88] In this section, overall population growth is now the focus, because total population is the basis for apportioning U.S. House seats[89] and a state must draw its U.S. House districts with strictly equal populations.[90]

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[85] *See id.*

[86] The Census Bureau estimates that Texas grew at 9.2%—around 2.3 million people—between 2010 and 2015, while the country as a whole grew only 4.1%. U.S. Census, QuickFacts, http://www.census.gov/quickfacts/table/PST045214/00,48 [http://perma.cc/LD64-UJCL]. If such growth continues, Texas may well equal 2010's apportionment haul.

[87] One recent analysis predicts that Texas will gain three seats after the 2020 Census, increasing its total from thirty-six to thirty-nine seats in the U.S. House. *See* Sean Trende, *Census Data Shed Light on 2020 Redistricting*, RealClear Politics (Dec. 22, 2016), http://www.realclearpolitics.com/articles/2016/12/22/census_data_shed_light_on_2020_redistricting__132623.html [http://perma.cc/4T4Q-57NX].

[88] *Infra*, Part II–A.

[89] For an explanation of the Census's apportionment of new seats based on population growth, see U.S. Census, *Computing Reapportionment* (2013), https://www.census.gov/population/apportionment/about/computing.html [http://perma.cc/E8WX-XUTW].

[90] *See* Wesberry v. Sanders, 376 U.S. 1, 7–9 (1964).

TABLE 6. POPULATION GROWTH BY RACE
(TEXAS METROPOLITAN AREAS)

Metro Area	2010 Pop.	2020 Pop.	Total	Anglo	Black	Hispanic
Houston–Woodlands–Sugar Land	5,920,416	6,897,952	**977,536**	58,544	132,260	632,049
Dallas–Fort Worth–Arlington	6,426,214	7,404,982	**978,768**	90,699	158,263	568,231
Austin–RoundRock	1,716,289	2,077,981	**361,692**	117,551	18,402	183,548
San Antonio–NewBraunfels	2,142,508	2,471,484	**328,976**	35,175	19,254	244,952
McAllen–Edinburg–Mission	774,769	948,305	**173,536**	-1,405	450	171,366
Brownsville–Harlingen	406,220	479,754	**73,534**	-3,918	160	76,187
Laredo	250,304	305,881	**55,577**	548	115	54,545

Data obtained from TEXAS STATE DATA CENTER, OFFICE OF THE STATE DEMOGRAPHER, 2014 TEXAS POPULATION PROJECTIONS BY MIGRATION SCENARIO DATA TOOL, http://osd.texas.gov/Data/TPEPP/Projections/Tool [http://perma.cc/6U6L-5SVZ] (search run by Metro SA, comparing 2010 and 2020, based on "1/2 2000–2010" migration rate, for ages 0–85+, all races and ethnicities selected).

As the above table indicates, the Houston metropolitan area will add more than enough people for an entirely new district, as will Dallas–Fort Worth area.[91] Importantly, the vast majority of the population growth will be among racial minorities.[92] It will be a true challenge for mapmakers to create districts that are not minority opportunity districts. It will also be a challenge for mapmakers to address the population growth in central and south Texas. As the table shows, the combined population growth of San Antonio and Austin could almost support an entirely new district.[93] Alternatively, the growth in south Texas, combined with San Antonio, could sustain another district in south Texas—either another north-south district from the border to central Texas or a compact district in the Rio Grande Valley.[94]

The Panhandle, west Texas, and east Texas should not get a new district. Lubbock and Amarillo are projected to add only 29,000 and 26,000 people, respectively, and Midland and Odessa only 18,000 and 20,000, respectively.[95] Similarly, Tyler is expected to add only 22,000; Longview only 20,000; and Beaumont–Port Arthur only 25,000.[96] Such

[91] *See supra* Table 6.
[92] *See id.*
[93] *Id.*
[94] TEXAS LEGISLATIVE COUNCIL, *supra* note 33 (114th Congress Map).
[95] TEXAS STATE DATA CENTER, *supra* note 2.
[96] *Id.*

growth would merely allow the existing districts to keep pace with the rising population level of all U.S. House districts.

II. *Bartlett v. Strickland* and its Limits on Section 2

The demographic change in Texas between 2010 and 2020 will affect legislative districts in three distinct ways that could have significance under Section 2 of the VRA. First, a single racial minority group could become a majority or increase its existing majority. Such majority-minority districts are the likely outcome in Texas's Twenty-Seventh and Twenty-Third Districts, and the federal courts have dealt frequently with states' efforts to counteract the emergence of such districts.[97] Second, a single racial or ethnic minority group could comprise a substantial minority of a district's voting-age population and could thus control the district if combined with crossover white votes.[98] This was the situation presented in *Bartlett v. Strickland*, and according to that decision, such crossover districts are not protected by Section 2 if state mapmakers weaken the minority groups' voting strength by separating them into different districts.[99] Third, a coalition of minority groups could comprise a potentially controlling majority in a district. *Bartlett* expressly acknowledged this possibility without addressing it.[100] These minority-coalition districts are discussed in Part III.

As established in Part I, many congressional districts in Texas will have increasingly substantial Latino populations, and state mapmakers will likely try to curtail the threat that their increase will pose to partisan control of those districts. In *Bartlett*, the Supreme Court could have interpreted the VRA to preserve the developing voting strength of such minority groups. Instead, the Court did the opposite, drawing on the *Shaw v. Reno* line of cases to curtail the reach of Section 2.[101] Consequently, it issued a decision inviting mapmakers in Texas and other states

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[97] *See, e.g.*, LULAC v. Perry, 548 U.S. 399, 439–42 (2006) (analyzing the 2003 redrawing of Texas's Twenty-Third District).

[98] So-called "crossover" districts are those "in which the minority makes up less than a majority of the voting-age population, but is large enough to elect the candidate of its choice with help from majority voters who cross over to support the minority's preferred candidate." Bartlett v. Strickland, 556 U.S. 1, 3 (2009).

[99] *Id.* at 14–15. The possible exception to that, suggested in dicta, is if there is evidence of intentional discrimination. *Id.* at 20.

[100] *Id.* at 13–14.

[101] *Infra*, Part II–B.

experiencing similar demographic change to weaken the voting strength of these growing minority communities.[102]

A. The Background to *Bartlett*

The dispute in *Bartlett* concerned the first of three requirements that the Supreme Court established in *Thornburg v. Gingles* to screen invalid or irremediable Section 2 claims—that the minority group be "sufficiently large and geographically compact to constitute a majority in a single-member district."[103] In *Gingles*, plaintiffs had alleged that North Carolina's use of multi-member districts for its state legislature prevented black residents of those districts from electing their preferred candidates, because they could not overcome the votes of the white majority.[104] Given that the plaintiffs' claim identified the scheme of multi-member districts as the specific cause of vote dilution,[105] the first *Gingles* requirement raised the fair and sensible question whether a single-member district scheme would produce different outcomes.[106]

Because all the plaintiffs in *Gingles* could satisfy the requirement of a sufficiently compact single-district majority,[107] there was no need for the Court to ask whether a smaller black population might nevertheless experience impermissible vote dilution. Accordingly, Justice Brennan's plurality opinion acknowledged that the Court was not considering whether the *Gingles* requirements were "fully pertinent" to a vote dilution claim regarding single-member districts.[108] Justice Brennan further reserved the question that *Bartlett* would later decide—whether a racial minority group, accounting for less than half of a district's population, could bring a vote dilution claim.[109]

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[102] *Bartlett*, 556 U.S. at 42 n.5 (Souter, J., dissenting) ("North Carolina could fracture and submerge in majority-dominated districts the 12 districts in which black voters constitute between 35% and 49% of the voting population . . . without ever implicating § 2.").

[103] Thornburg v. Gingles, 478 U.S. 30, 50–51 (1986) (also requiring the minority group "to show that it is politically cohesive" and that "the white majority votes sufficiently as a bloc to enable it . . . to defeat the minority's preferred candidate.").

[104] *Id.* at 34 (asking whether this sort of multi-member districting scheme "impair[ed] the opportunity of black voters 'to participate in the political process and to elect representatives of their choice.' ") (quoting 42 U.S.C. § 1973 (1986), *amended by* Act of June 29, 1982, Pub. L. No. 97-205, § 3, 96 Stat. 134).

[105] *Id.* at 46.

[106] *Id.* at 50.

[107] *Id.* at 80. The Supreme Court did reverse the District Court's finding of vote dilution with regard to one district, but that was on other grounds (sustained black electoral success in that particular district). *Id.* at 77.

[108] *Id.* at 46 n.12.

[109] *Id.* Notably, in Justice O'Connor's concurrence—joined by Justices Powell and Rehnquist and Chief Justice Burger—she indicated her approval of such a vote dilution claim. *Id.* at 89 n.1 ("[I]f a minority group that is not large enough to constitute a voting majority in a single-member district can show that white support would probably be forthcoming . . . to an extent that would enable the

In *Growe v. Emison*,[110] the Court adopted the three *Gingles* requirements in unaltered form to evaluate vote dilution in single-member districts.[111] Its application of the first *Gingles* requirement to single-member districts seems to have occurred without much thought, because a raft of other errors in the lower court's opinion occupied the Court's attention.[112] Nevertheless, the Court in *Growe* again reserved the question that *Bartlett* would later decide.[113]

The question then arose in *LULAC v. Perry* concerning Texas's Twenty–Fourth District, and the Court's disagreement there foreshadowed the result in *Bartlett*.[114] The citizen voting-age population (CVAP) of the Twenty-Fourth was 25.7% black, 20.8% Hispanic, and 49.8% Anglo at the time the district was dismantled, prior to which a multiracial coalition had repeatedly elected Democrat Martin Frost.[115] Justice Souter, in dissent, recognized that the Twenty-Fourth presented the question that had been reserved in *Gingles* and *Growe*.[116] Echoing Justice O'Connor's concurrence in *Gingles*,[117] Justice Souter viewed the vote dilution claim as valid, because the district's minority voters consistently united to elect Frost.[118] The dismantling of the district ended that run of electoral success, and in Justice Souter's view, no reason existed to deprive these voters of the VRA's protection.[119]

Justice Kennedy, who announced the Court's judgment, perceived that Justice Souter's reasoning would cause Section 2 claims to arise much more frequently.[120] Consequently, he concluded that there was no valid Section 2 claim against the "cracking" of districts like Texas's Twenty-Fourth.[121] However, he reached this interpretation of the statute on curious, extra-textual grounds. First, Justice Kennedy noted that Frost

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election of the candidates its members prefer, that minority group would appear to have demonstrated that . . . it would be able to elect some candidates of its choice.").

[110] 507 U.S. 25 (1993).

[111] *Id.* at 40.

[112] *Id.* at 41 (noting that the District Court had ignored the *Gingles* requirements altogether and that, if it had applied them, the second and third requirements would not have been met).

[113] *Id.* at 41 n.5. Likewise, in a subsequent case, the Supreme Court *arguendo* treated an "influence-dilution claim" as cognizable under Section 2. Voinovich v. Quilter, 507 U.S. 146, 154, 158 (1993).

[114] *Compare* LULAC v. Perry, 548 U.S. 399, 443–46 (2006) (Kennedy, J.) (finding that minority group must show that they constitute a sufficiently large population to elect their candidate of choice with the assistance of crossover votes), *with id.* at 484–91 (Souter, J., concurring in part and dissenting in part) (suggesting that a minority comprising 50% or less of the voting population might suffice at the *Gingles* gatekeeping stage).

[115] *Id.* at 443.

[116] *Id.* at 484–85.

[117] *Id.* at 486 (quoting Thornburg v. Gingles, 478 U.S. 30, 89 n.1 (1986) (O'Connor, J., concurring); *see also supra* note 109.

[118] *Id.* at 489.

[119] *Id.* at 485, 489.

[120] *See id.* at 446 (Kennedy, J.) ("If § 2 were interpreted to protect this kind of influence, it would unnecessarily infuse race into virtually every redistricting.").

[121] *Id.* at 445.

consistently ran unopposed.[122] Because a choice was so rarely presented to voters, Justice Kennedy felt that it could not be concluded that Frost was minority voters' "candidate of choice,"[123] even though he received their near-unanimous support.[124] Justice Kennedy thus drew a novel distinction—because Frost was only minority voters' preferred candidate, but not necessarily their candidate of choice, they could not sue under Section 2 to preserve the district that elected him.[125]

Second, Justice Kennedy expressed concern that recognizing a Section 2 claim in this situation would "unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions."[126] In support of that contention, he cited his concurrence in *Georgia v. Ashcroft*, where he had written that the state legislative map at issue was drawn with "race [as] a predominant factor."[127] Justice Kennedy thereby subtly drew on the concept of "racial gerrymandering" developed in *Miller v. Johnson* and *Shaw v. Reno*.[128]

In *Miller v. Johnson*, a sharply divided court held that the government violated the Equal Protection Clause by "us[ing] race as a basis for separating voters into districts . . . absent [the] extraordinary justification" needed to use race consciously in policy- or law-making.[129] A government's districting choices aimed at compliance with the VRA might, if they went too far, contravene the government's obligation, imposed by *Miller*'s interpretation of the Equal Protection Clause, to "treat citizens as individuals, not as simply components of a racial, religious, sexual or national class."[130] According to *Miller*, such districting plans—despite good intentions to protect minority voting strength—relied on "the offensive and demeaning assumption" that all voters of the same race think alike.[131]

One might ask whether the concerns in *Miller* are applicable to a Section 2 claim that satisfies the *Gingles* threshold requirement of a "politically cohesive" plaintiff group.[132] If Section 2 plaintiffs demonstrate their political cohesion persuasively, this would do away with the con-

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[122] *Id.* at 444.
[123] *Id.* at 445 ("The opportunity 'to elect representatives of their choice,' 42 U.S.C. § 1973(b), requires more than the ability to influence the outcome between some candidates, none of whom is their candidate of choice.").
[124] *Id.* at 445–46.
[125] *Id.* For one explanation of Kennedy's thinking, see Michael S. Kang, *Race and Democratic Contestation*, 117 YALE L.J. 734, 798–99 (2008) (suggesting that black voters in the Twenty-Fourth did not feel they could safely challenge Frost for fear of losing the district altogether, which resulted in a lack of meaningful "democratic contestation" that troubled Kennedy).
[126] *LULAC*, 548 U.S. at 446 (citing Georgia v. Ashcroft, 539 U.S. 461, 491 (2003) (Kennedy, J., concurring)).
[127] *Ashcroft*, 539 U.S. at 491 (citing Miller v. Johnson, 515 U.S. 900 (1995)).
[128] *See, e.g.*, Shaw v. Reno, 509 U.S. 630, 632 (1993), *infra* notes 168–670 and accompanying text.
[129] 515 U.S. at 911 (citing *Shaw*, 509 U.S. at 652).
[130] *Id.* (citations and quotations omitted).
[131] *Id.* at 911–12.
[132] Thornburg v. Gingles, 478 U.S. 30, 50–51 (1986).

cern that mapmakers are grouping racial minorities together based on groundless assumptions. Indeed, in the factual record of *LULAC*, the voting behavior of the Twenty-Fourth's black and Hispanic residents showed consistent, unified support for their representative.[133] But Justice Kennedy declined to construe the VRA to protect these voters' preference as revealed through years of voting behavior.[134] Instead, he relied on the concerns about race-conscious districting raised in the *Shaw–Miller* jurisprudence in order to place the Twenty-Fourth's minority voters outside the scope of Section 2's protection.[135] His opinion in *Bartlett* would replicate this logic.

B. The *Bartlett* Decision

The dispute in *Bartlett* concerned District 18 in the North Carolina House of Representatives.[136] Though its black residents had once comprised a majority of its VAP, their numbers had steadily decreased, falling to 39.3% by 2003, the year that the challenged district was drawn.[137] To maintain the population at that level, state mapmakers split Pender County, which violated the state constitution's requirement to preserve counties whole.[138] That county and its commissioners brought suit based on that state constitutional requirement.[139] State officials responded that Section 2 required them to split Pender County in order to keep enough minority voters together to elect their candidate of choice with the aid of crossover white votes.[140] If Section 2 so applied, it would supersede the state constitution and defeat the county officials' claim.[141]

Justice Kennedy's plurality opinion[142] rejected the state officials' argument, holding broadly that Section 2 is inert unless and until the minority group in question can "elect [a] candidate based on their own votes and without assistance from others."[143] Justice Kennedy assumed without evidence or argument that a minority group comprising less than half a district's population has "no better or worse opportunity to elect a candidate than does any other group of voters with the same relative

[133] LULAC v. Perry, 548 U.S. 399, 489 (2006).
[134] *Miller*, 515 U.S. at 912.
[135] *Id.* at 913–14.
[136] Bartlett v. Strickland, 556 U.S. 1, 7 (2009).
[137] *Id.* at 7–8.
[138] *Id.* at 8.
[139] *Id.*
[140] *Id.*
[141] *See* U.S. CONST. art. IV, cl. 2.
[142] *Bartlett*, 556 U.S. at 5. Justices Thomas and Scalia concurred in the judgment but would have held that Section 2 authorizes no vote dilution claim whatsoever. *Id.* at 26 (Thomas, J., concurring).
[143] *Id.* at 14 (plurality opinion).

voting strength."[144] To reach this questionable conclusion, Justice Kennedy limited the VRA's mandate, altered the analytical framework of *Gingles*, and as in *LULAC*, used the *Shaw–Miller* jurisprudence to control the interpretation of the VRA.

1. Limiting the Voting Rights Act's "Mandate"

Justice Kennedy held that the state officials' understanding of Section 2 was "contrary to the [law's] mandate."[145] Those officials had faced a choice between preserving a minority group's voting strength and letting it wane. That Justice Kennedy perceived their decision to pursue the former as contrary to the law's mandate is a measure of how the Supreme Court's interpretation of the VRA has changed across time.

In its original affirmation of the VRA, the Court recognized that discrimination in voting was "an insidious and pervasive evil" that required "sterner and more elaborate measures" to defeat.[146] Later, confronting vote dilution through legislative districting, the Court recognized that districting schemes can "operate to minimize or cancel out the voting strength of racial [minorities in] the voting population," so it interpreted Section 2 to prohibit schemes that had that effect.[147]

Admittedly, *Bartlett*'s facts did not suggest insidious evil or state action to cancel out minority voting strength. Instead, the conundrum of District 18 seemed to arise from populations' natural waxing and waning. Consequently, if the Supreme Court's majority felt that the case's facts did not really implicate the VRA, it could have resolved *Bartlett* narrowly, without lasting effects on Section 2. The Court could simply have ruled that the splitting of Pender County did not affect District 18's VAP meaningfully enough to implicate Section 2, given that its black VAP would only drop from 39.36% to 35.33% if the county were not split.[148] Whether Section 2 requires creating a majority-minority district on a given set of facts is an "intensely local appraisal" that is "peculiarly dependent upon the facts of each case."[149] The Court could have held only that the facts before the North Carolina legislature did not make the case for a majority-minority district clearly enough to warrant the legisla-

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[144] *Id.*
[145] *Id.*
[146] South Carolina v. Katzenbach, 383 U.S. 301, 309 (1966).
[147] Thornburg v. Gingles, 478 U.S. 30, 47–48 (quoting Burns v. Richardson, 384 U.S. 73, 88 (1966)).
[148] *Bartlett*, 556 U.S. at 8. *See also* Richard Pildes, *Is Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. Rev. 1517, 1539 (2002) (suggesting that black voters should comprise 33% to 39% of a Southern district's registered-voter population in order to create winning coalitions with crossover white voters).
[149] *Gingles*, 478 U.S. at 79 (citations omitted).

ture's use of race in the drawing of the district. Such a ruling would not close the door to a post-enactment challenge if the new district in fact turned out to dilute the voting strength of the district's minority population.

Instead, Justice Kennedy issued a broad ruling. Though the facts here indicated a decreasing minority group population, Kennedy's ruling also appears to reach expanding minority groups that are not yet majorities in their districts.[150] The breadth of this ruling is somewhat surprising, given Justice Kennedy's previous recognition that state action to prevent a minority population from becoming a majority in a district would violate Section 2.[151] Because Justice Kennedy overlooked that possibility in *Bartlett*, it was his own understanding of Section 2—not that of the state officials—that ran contrary to Section 2's mandate as Justice Kennedy himself had previously formulated it.

2. Altering the *Gingles* Requirements

Likewise, Justice Kennedy's strict interpretation of the first *Gingles* requirement—that the minority group be "sufficiently large and geographically compact to constitute a majority in a single-member district"[152]—was unnecessarily restrictive. Admittedly, the language from *Gingles* did call for a "majority" in a single-member district, but the Court had repeatedly and expressly left open the question of whether a strict majority of 50% was really required.[153] Moreover, Justice Kennedy's interpretation neglected the role of the other *Gingles* threshold requirements and the totality-of-the-circumstances analysis that follows once plaintiffs have cleared the initial threshold.[154] Those parts of the *Gingles* framework serve to let through only valid and remediable claims, meaning that the profusion of Section 2 claims that loomed large in Justice Kennedy's imagination was unlikely to ever occur.[155]

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[150] *See Bartlett*, 556 U.S. at 19–20 (stating simply, "It remains the rule, however, that a party asserting § 2 liability must show by a preponderance of the evidence that the minority in the potential election district is greater than 50 percent.").

[151] LULAC v. Perry, 548 U.S. 399, 439–42 (2006).

[152] *Gingles*, 478 U.S. at 50.

[153] *Supra*, Part II–A.

[154] *Bartlett*, 556 U.S. at 12, 16–17. For the three *Gingles* requirements, see *supra* note 104 and accompanying text. After the three threshold requirements are met, the trial court must consider whether, on the totality of the circumstances, "the political processes leading to nomination or election . . . are not equally open to participation by members of a [protected class] . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Gingles*, 478 U.S. at 43 (quoting 42 U.S.C. § 1973 (1986)).

[155] *Bartlett*, 556 U.S. at 22.

The second and third *Gingles* requirements—cohesive minority voting and majority bloc voting—are particularly important.[156] When voting is less racially polarized, a minority group's decrease from 39% to 35% of a district's population might not meaningfully diminish its ability to elect its preferred candidate.[157] When voting is more racially polarized, however, the situation is different. If the minority group's support for a candidate brings with it disproportionate opposition to that candidate, then the minority group's very expression of its preference erects an obstacle to the realization of that preference. It might make a crucial difference that the minority dropped from 39% to 35%, because the number of potential crossover votes would be so limited.

Similarly, where the Senate Report factors[158] are present, a racial minority's efforts to mobilize politically must overcome significant obstacles. Even a small reduction in the minority group's size might again make an important difference. Thus, when the other *Gingles* requirements are met and the factors in the totality-of-the-circumstances analysis are present, a minority group's voting strength deserves protection, whether it falls just above the 50% threshold or just below.

Justice Kennedy's neglect of both racially polarized voting and the Senate Report factors led him to say that "[n]othing in Section 2 grants special protection to a minority group's right to form political coalitions" and that "minority voters are not immune from the obligation to pull, haul, and trade to find common political ground."[159] But these jabs are parrying straw men. When a minority group facing racial polarization and a history of discrimination brings a Section 2 claim, it does not seek "immunity" from this obligation. Instead, it is showing that there are past and present obstacles to the interracial formation of common ground, and the existence of those obstacles should prohibit legislative mapmakers from making that task any harder than it already is.

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[156] Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1851 (1992) (characterizing "the polarized voting inquiry as the heart of a vote dilution claim").

[157] *See* Pildes, *supra* note 148.

[158] In *Gingles*, when discussing the totality-of-the-circumstances analysis that follows once plaintiffs have satisfied the three threshold requirements, the Court highlighted the following factors from the Senate Report that accompanied the 1982 amendments to the VRA:

> [T]he history of voting-related discrimination in the State or political subdivision; . . . the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority vote requirements, and prohibitions against bullet voting; the exclusion of members of the minority group from candidate slating processes; the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; the use of overt or subtle racial appeals in political campaigns; and the extent to which members of the minority group have been elected to public office in the jurisdiction.

478 U.S. at 44–45 (citing S. REP. No. 97-417, at 28–29 (1982)).

[159] *Bartlett*, 556 U.S. at 15 (quoting, for the second statement, Johnson v. DeGrandy, 512 U.S. 997, 1020 (1994)).

Justice Kennedy then overstated both the difficulty of adjusting the *Gingles* framework to accommodate cases like *Bartlett* and the "tension" that such cases would create with the *Gingles* requirement of racially polarized voting.[160] That tension is illusory. Section 2 plaintiffs whose position is analogous to District 18 should be required to show both that racially polarized voting exists and that the minority group comprises "a sufficiently large minority population to elect candidates of its choice"[161] with the help of sufficient crossover votes. These two conditions would work effectively together to screen invalid Section 2 claims.[162]

Suppose, to consider an extreme hypothetical, that redistricting cuts a district's black VAP from 10% to 5%, and the remainder of the community is white. This community would not have a Section 2 claim on a crossover theory, because it would require nearly half the white residents to form a winning coalition. With such extensive white support, the requirement of racially polarized voting could clearly not be met.

Suppose, to consider a hypothetical closer to the facts of *Bartlett*, that the black VAP of District 18 continued to comprise 45% of the district, and 90% voted for the same candidate. The white residents, meanwhile, comprised 55% and voted 80% for the other candidate.[163] The black residents' preferred candidate would receive 51.5%, while the other candidate would receive 48.5%.[164] It would be difficult to deny with a straight face that this hypothetical district demonstrated racially polarized voting. Despite that polarization, and despite comprising less than the strict 50% of the population, the black voters would still be able to elect their candidate of choice. But if the black population were cut to 40% or below, and the white population increased accordingly, the black voters would fall short of controlling the district. Preserving that marginal 5% could make the difference for these voters. In addition, preserving minority voting strength under these circumstances could potentially

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[160] *Id.* at 16.

[161] An alternative formulation of the first *Gingles* factor. *See DeGrandy*, 512 U.S. at 1008. In *Bartlett*, Kennedy dismissed this formulation as dictum. 556 U.S. at 15.

[162] *Bartlett*, 556 U.S. at 33–34 (Souter, J., dissenting). *But see* Pildes, *supra* note 148, at 1554–56 (detailing the host of questions that this kind of functional approach would raise).

[163] The voting breakdowns in *Gingles* were in this range. *See* 478 U.S. at 59 ("In the primary elections, white support for black candidates ranged between 8% and 50%, and in the general elections it ranged between 28% and 49%."). In *Bartlett*, Kennedy was skeptical that black residents of District 18 could show racial polarization, because they would need almost 20% of the white voters to support their candidate to win. 556 U.S. at 16. That proportion would be well within the range of racial polarization recognized in *Gingles*, which Kennedy neglected to mention. *Id.* at 15.

[164] *See* Pildes, *supra* note 148, at 1532–36, for empirical evidence of such outcomes. *See also* Ryan Haygood, *The Dim Side of the Bright Line: Minority Voting Opportunity After* Bartlett v. Strickland, HARV. C.R.-C.L. L. REV. AMICUS 9–10 (Feb. 25, 2010), http://harvardcrcl.org/the-dim-side-of-the-bright-line-minority-voting-opportunity-after-bartlett-v-strickland-by-ryan-p-haygood/ [http://perma.cc/MN57-LR7N].

bring about salutary social effects, because an incentive would exist to reach across the racial divide.[165]

If racial polarization decreased, plaintiffs would have a harder time satisfying the third *Gingles* requirement, but they would also have less need for the VRA's protection.[166] Instead, Justice Kennedy's ruling created a different dynamic. *Bartlett* permits the white majority to limit minority voting strength by preventing their populations from accumulating. Rather than an incentive to reach across racial lines, the incentive is to divide and conquer.[167]

The last element of Justice Kennedy's analysis was "the need for workable standards and sound judicial and legislative administration."[168] While this concern is important, it is a thin reed on which to base a substantial narrowing of Section 2's potential scope. Moreover, it is disingenuous. Kennedy worried that the Court would be "in the untenable position of predicting many political variables and tying them to race-based assumptions."[169] But the *Gingles* requirements already entailed that sort of analysis.[170] Of course, if plaintiffs cannot prove the requisite elements, they should not succeed, but that does not require foreclosing their claims altogether.

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[165] *Bartlett*, 556 U.S. at 34 (Souter, J., dissenting). *See also* Pildes, *supra* note 148, at 1548 ("Coalitional districts would seem to encourage and require a kind of integrative, cross-racial political alliance that might be thought consistent with, even the very ideal of, both the VRA and the U.S. Constitution."); Haygood, *supra* note 164, at 11–12 (extolling the ancillary benefits of crossover districts). *But see* Kang, *supra* note 125, at 798–800 (criticizing coalition districts on the view that they require minority groups to adhere to strict intragroup cohesion).

[166] Suppose, instead, that racial polarization increased. This would put the minority population in an unfortunate position without redress from the VRA. However, that is the known and unavoidable drawback of the winner-take-all system. Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes*, 71 TEX. L. REV. 1589, 1592 (1993).

[167] *See* Pildes, *supra* note 148, at 1573 (anticipating that a formal approach akin to Kennedy's in *Bartlett* would "abandon integrated electoral politics, even where effective, in favor of a system of monoracial dominated electoral politics, where the race that dominates in some places is white, in some black").

[168] *Bartlett*, 556 U.S. at 17. *See* Pildes, *supra* note 148, at 1520–21 (explaining that judges are attracted to bright-line rules in the voting-rights context due to the perception that such rules "appear to distance the courts from underlying struggles over political power").

[169] *Bartlett*, 556 U.S. at 17.

[170] *Id.* at 37, 39–40 (Souter, J., dissenting) (acknowledging the vagaries of voter registration levels, turnout, and so on, and the necessarily messy nature of Section 2 claims). Another reason Kennedy's administrability concern does not stand up to scrutiny is that one of the potentially difficult questions the Court would supposedly have to answer ("Were past crossover votes based on incumbency and did that depend on race?" *Id.* at 17 (majority opinion)) is a causation inquiry that *Gingles* expressly excluded from the analysis of racial polarization. 478 U.S. 30, 62–63 (1986). *See* Pildes, *supra* note 148, at 1566–67 (explaining the increasingly divergent views on the Court and among the lower courts on that issue).

3. Importing the *Shaw–Miller* Jurisprudence

Justice Kennedy's concern about the Court's "untenable position" reveals that a key basis for his decision was the preference for colorblindness developed in the *Shaw–Miller* jurisprudence, just as it was in *LULAC*. For Kennedy, the "moral imperative of racial neutrality is the driving force of the Equal Protection Clause."[171] Again as in *LULAC*, Kennedy quoted one of his own opinions, this time from *Richmond v. J.A. Croson Co.*, which concerned a city's requirement that a certain percentage of contracts go to minority-owned businesses.[172] Kennedy then quoted Justice O'Connor's worry in *Shaw v. Reno* that "[r]acial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions."[173]

By this point, Justice Kennedy had moved well beyond the facts at hand. In *Bartlett*, the parties had already stipulated to the presence of racial polarization.[174] Balkanization already existed. Instead, Justice Kennedy appealed to an imagined problem with imaginary effects. As a result, he failed to address properly the case's real issues and to accord fair consideration to crossover districts, a potential solution to the risk of racial factionalism that was his ostensible concern.

As in *LULAC*, the *Shaw–Miller* jurisprudence again came to the fore. In construing the Equal Protection Clause as a mandate to treat citizens as individuals and rarely, if ever, as members of groups,[175] those cases developed an "increasingly individualistic, anti-essentialist vision of rights" that had "coexisted uneasily" with the VRA.[176] Requiring gov-

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[171] *Bartlett*, 556 U.S. at 21 (quoting Richmond v. J.A. Croson Co., 488 U.S. 469, 518–19 (1989) (Kennedy, J., concurring)). Kennedy's understanding of the Equal Protection Clause is not universally shared. For example:

> The Constitution is both color blind and color conscious. To avoid conflict with the equal protection clause, a classification that denies a benefit, causes harm, or imposes a burden must not be based on race. In that sense, the Constitution is color blind. But the Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination. The criterion is the relevancy of color to a legitimate governmental purpose.

Gratz v. Bollinger, 539 U.S. 244, 302 (2003) (Ginsburg, J., dissenting) (quoting Judge John Minor Wisdom's famous passage in United States v. Jefferson Cty. Bd. of Educ., 372 F.2d 836, 876 (5th Cir. 1966), *aff'd on reh'g*, 380 F.2d 385 (5th Cir. 1967)).

[172] *Richmond*, 488 U.S. at 477–78.

[173] *Bartlett*, 556 U.S. at 21 (quoting Shaw v. Reno, 509 U.S. 630, 657 (1993)).

[174] 556 U.S. at 9.

[175] Miller v. Johnson, 515 U.S. 900, 911–12 (1995).

[176] Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1667 (2001). The lead attorney responsible for *Shaw* and subsequent challenges was opposed to federal coercion of the states through the VRA, disapproved of the perceived use of racial stereotypes by legislative mapmakers, and feared for the efficacy of representation in districts that resulted from the purported racial gerrymander. TINSLEY E. YARBOROUGH, RACE AND REDISTRICTING: THE *Shaw–Cromartie* Cases 35–39, 61–62 (2002). *See also* Pildes, *supra* note 148, at 1542 (describing

ernments to see citizens only as individuals, and never as group members, is at odds with the nature of contested elections. Politics is based on groups, a view that Kennedy himself expressed in *Bartlett* when he described coalition-building as the effort "to pull, haul, and trade to find political common ground."[177] Moreover, for minority groups confronted with racially polarized voting and related obstacles,[178] the barriers to their political participation are fundamentally tied to their status as members of a disfavored group.[179] This is no less true if the black residents of North Carolina's District 18 are marginally greater than or marginally less than half of the district's VAP. The group-based remedies of Section 2 therefore are an appropriate protection for the group-based injuries that voters experience.

By importing the underlying principles of the *Shaw–Miller* jurisprudence, *Bartlett* instead subordinated the VRA and exposed minority voters to the probability of irremediable group-based injuries in the future. After 2001,[180] "racial gerrymandering cases became far less frequent."[181] Some observers even questioned the Court's continued commitment to the principles underlying the *Shaw–Miller* jurisprudence.[182] The role of that jurisprudence in Justice Kennedy's *LULAC* and *Bartlett* opinions shows that it continued to exert an important constraining force on the Supreme Court's interpretation of the VRA.

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the injury recognized in *Shaw* as an "expressive harm" suffered when officials convey the message that race matters in state decision-making).

[177] 556 U.S. at 15 (quoting Johnson v. DeGrandy, 512 U.S. 997, 1020 (1994)).

[178] *See* Senate Report factors, *supra* note 158.

[179] Gerken uses the term "aggregate rights," as opposed to individual rights, to connote the group-based nature of the injuries and remedies in vote dilution cases. Gerken, *supra* note 176, at 1667.

[180] Easley v. Cromartie, 532 U.S. 234 (2001). *Easley* was the fourth case about racial gerrymandering to reach the Supreme Court from North Carolina in under a decade, following *Shaw*, *Miller*, and Hunt v. Cromartie, 526 U.S. 541 (1999). In *Easley*, North Carolina finally produced a map that the Court did not find to be an impermissible racial gerrymander. 532 U.S. at 258. It is beyond the scope of this piece, but it should be noted that the racial gerrymandering claim reemerged in Alabama Legislative Black Caucus v. Alabama, 135 S. Ct. 1257 (2015), reinvented as a tool to combat vote dilution. For analysis, see Rick Hasen, *Racial Gerrymandering's Questionable Revival*, 67 ALA. L. REV. 365 (2015).

[181] Hasen, *supra* note 180, at 372.

[182] *See, e.g.*, STEVEN ANDREW LIGHT, "THE LAW IS GOOD": THE VOTING RIGHTS ACT, REDISTRICTING, AND BLACK REGIME POLITICS 144–45 (2010) ("In upholding the North Carolina legislature's actions in *Easley*, however, the Supreme Court—including Justice O'Connor, who voted with the majority to uphold the revised Twelfth District—seemed to pull back somewhat from the *Shaw* // *Miller* standards.") (citing Easley v. Cromartie, 532 U.S. 234 (2001)); Gerken, *supra* note 176, at 1692 ("The *Shaw* majority appears to have backed away from [the original] explanations [of its logic] during the last six years."). *But see* Pildes, *supra* note 148, at 1540–41 (anticipating that *Shaw* and subsequent cases would have a significant influence on redistricting following the 2000 Census).

III. The Prospects for Future Plaintiffs under Section 2

If the redistricting cycle following the 2020 Census features the same problems of racial and partisan gerrymandering as past cycles, affected racial minority groups in Texas will face two challenging questions in the wake of *Bartlett v. Strickland*. First, is there any way to gain Section 2's protection against the "cracking" of a minority population that is not yet a majority of a district but—unlike in North Carolina's House District 18—is growing to that level? Second, does Section 2 protect minority-coalition districts, in which two or more minority groups form a majority of the district's voting-age population?

A. The Middle Way between *LULAC* and *Bartlett*

Minority voters who do not yet represent a majority in their district but may represent such a majority in the near future should draw attention to the factual differences between Texas's Twenty-Third District as addressed in *LULAC*, which was protected by the VRA,[183] and North Carolina's House District 18 as addressed in *Bartlett*, which was not so protected.[184] In *LULAC*, Justice Kennedy was persuaded that the cracking of the Twenty-Third's Latino voters was a Section 2 violation because they were an "increasingly powerful" presence in the district[185] and a looming threat to the Republican incumbent.[186] By replacing some of them with white voters elsewhere, "the State took away the Latinos' opportunity because Latinos were about to exercise it."[187] By contrast, the demographic trend of the black population of North Carolina's House District 18 was headed in the other direction.[188]

Plaintiffs nearing a majority of their district's population should liken themselves to the Twenty-Third's Latino voters and portray attempts to divide them as obstruction of their political success.[189] Under the apparent rule of *Bartlett*, Section 2's protection will not attach until they reach 50% of a district's VAP.[190] However, state action could pre-

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[183] LULAC v. Perry, 548 U.S. 399, 423–42 (2006).
[184] Bartlett v. Strickland, 556 U.S. 1, 7–9 (2009).
[185] 548 U.S. at 423.
[186] *Id.* at 439.
[187] *Id.*
[188] *Bartlett*, 556 U.S. at 7–8.
[189] Kennedy did suggest that a showing of mapmakers' intent could win Section 2's protection for a minority group comprising less than half of its district's population. *Id.* at 20.
[190] *See* 556 U.S. at 26 ("Only when a geographically compact group of minority voters could form a majority in a single-member district has the *Gingles* requirement been met.").

vent them from reaching that threshold. It cannot be that the state mapmakers' discriminatory vote dilution against the Latino population in *LULAC* would have been permissible if they had simply done it several years earlier. Therefore, in keeping with *LULAC*'s protection of Texas's Twenty-Third, a minority group should have Section 2's protection as it nears a majority, because otherwise it would never reach 50%. To deny it that protection would not only defy the logic of *LULAC* but would also encourage invidious gerrymandering.

Plaintiffs could further argue that *Bartlett*'s holding is more limited than meets the eye. *Bartlett* did not present the conventional vote dilution scenario.[191] Voters alleging actual injury due to minority vote dilution were not parties to the case.[192] As such, the ordinarily voluminous factual record accompanying a Section 2 challenge was not before the Court. Rather, the actual question before the Court was only whether state officials had to preserve a minority group's percentage of its district's population when officials' best guess was that it would otherwise decrease. In this respect, adjudicating the state officials' preemptive line-drawing in *Bartlett* was akin to hearing a pre-enforcement challenge to a law. Little factual record had yet been developed, and effects could only be guessed. A typical challenge under Section 2, with voters demonstrating actual injury, would present a different question. By altering the requirements for injured voters to bring a Section 2 claim, and not just for state officials taking preemptive action, the discussion in Justice Kennedy's plurality opinion went further than necessary. It changed the law applicable to a scenario that the case did not actually present.

The law may remedy a harm inflicted in certain situations without requiring the extension of a preemptive benefit in other situations.[193] The Voting Rights Act can be a bulwark against minority vote dilution without, as Justice Kennedy feared, being implicated every time a population expands or contracts. By highlighting this distinction, and by analogizing to Texas's Twenty-Third in *LULAC*, plaintiffs may be able to carve a path around *Bartlett*'s holding.

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[191] *Id.* at 6.

[192] *Id.* at 8.

[193] *Cf.* Veasey v. Abbott, 830 F.3d 216, 277–78 (5th Cir. 2016) (Higginson, J., concurring) (noting, in the context of voter ID requirements, the "difference between making voting *harder* in ways that interact with historical and social conditions to disproportionately burden minorities and making voting *easier* in ways that may not benefit all demographics equally"). It may require "fact-specific and close distinctions" to identify the difference in practice, but that difficulty should not excuse courts from the work of protecting "the fundamental right to vote" that the VRA entrusts to them. *Id.* at 279–80.

B. Preserving Minority-Coalition Districts

Bartlett reserved the question of whether Section 2 protects against the "cracking" of minority-coalition districts,[194] in which "minority voters aggregated from two or more groups can collectively elect a candidate of their choice, even if no single minority group has such power individually."[195] A few years after *Bartlett*, the Texas redistricting litigation spawned by the 2010 Census, *Perry v. Perez*, reached the Court.[196] A three-judge panel in the Western District of Texas had substantially redrawn the maps for Texas's seats in the U.S. House of Representatives and for the Texas Legislature.[197] Its Texas House map produced several of what the panel's dissenting judge charged were inappropriate coalition districts but what the panel majority insisted were merely the natural result of restoring the status quo ante.[198] In a per curiam opinion finding many faults with the panel's maps, the Supreme Court rejected an apparent coalition district in the U.S. House map, citing *Bartlett* and saying that the panel had "no basis" for creating that district.[199] But in a curious omission, it did not mention any of the Texas House districts alleged by the panel dissent to be improper coalition districts.[200] With the Court's acknowledgment of the question in *Bartlett*, ambiguous treatment in *Perry v. Perez*,[201] and a continuing conflict among the lower courts,[202] the issue of coalition districts might soon be on the Supreme Court's docket.

Minority-coalition districts present different considerations than crossover districts, so the issue should not necessarily be settled by the logic of *Bartlett*. The sticking point in *Bartlett*—the threshold inquiry into the plaintiff group's size and compactness—would be no more difficult for a minority-coalition district than a majority-minority district.[203] Moreover, plaintiffs in Texas, unlike in some other states, have the bene-

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[194] *Bartlett*, 556 U.S. at 13–14.

[195] Dale E. Ho, *Two Fs for Formalism: Interpreting Section 2 of the Voting Rights Act in Light of Changing Demographics and Electoral Patterns*, 50 HARV. C.R.-C.L. L. REV. 403, 428 (2015).

[196] Perry v. Perez, 132 S. Ct. 934, 939 (2012).

[197] Perez v. Perry, 835 F. Supp. 2d 209, 211–12 (W.D. Tex. 2011).

[198] *Id.* at 216 (panel majority); *id.* at 224–26 (Smith, J., dissenting).

[199] *Perry*, 132 S. Ct. at 944 (U.S. House District 33 in the Dallas area) (citing *Bartlett*, 556 U.S. at 13–15).

[200] *Id.*; *see Perez*, 835 F. Supp. 2d. at 225–26 (Smith, J., dissenting) (discussing districts in Dallas County, Fort Bend County, and Bell County).

[201] Ho, *supra* note 195, at 429 (describing the Court's discussion as "difficult to discern" and not clearly interpretable as a statement of legal principle rather than as simply a ruling on the specific facts).

[202] *Id.* at 429–30 (cataloguing case law); Lauren R. Weinberg, *Reading the Tea Leaves: The Supreme Court and the Future of Coalition Districts Under Section 2 of the Voting Rights Act*, 91 WASH. U. L. REV. 411, 419–424 (2013) (contrasting the Fifth and Sixth Circuits' treatments of the issue).

[203] Ho, *supra* note 195, at 432.

fit of case law from the Fifth Circuit that recognizes the possibility of viable coalition districts under Section 2.[204] Even so, minority-coalition plaintiffs who decide to pursue coalition districts[205] will nevertheless have to strike a careful balance between clashing requirements created by the Supreme Court in *Bartlett* and *LULAC* and by the Fifth Circuit in its cases on coalition districts.

In *Bartlett*, Justice Kennedy was concerned about the difficult assumptions and predictions of voter behavior that courts would have to make in order to identify viable crossover districts.[206] Coalition districts present a somewhat similar challenge, in that courts must determine whether different minority groups will hold a coalition together.[207] Indeed, plaintiffs proposing coalition districts in the Fifth Circuit have often foundered on the second *Gingles* threshold requirement of minority political cohesion.[208]

Though not a formal requirement, statistical evidence of highly similar voting behavior is effectively a *sine qua non* of coalition claims.[209] In addition to that quantitative showing, plaintiffs should take guidance from the Supreme Court's rejection of Texas's proposed Twenty-Fifth District in *LULAC v. Perry*.[210] The Court held that the Twenty-Fifth, which stretched from the Rio Grande Valley to Austin 300 miles away, did not satisfy the *Gingles* requirements, because its enormous length impermissibly grouped populations with "disparate needs and interests."[211] Showing that the coalition's consistently similar political behavior is undergirded by shared needs and interests would help

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[204] *Compare* LULAC, Council No. 4434 v. Clements, 999 F.2d 831, 863–64 (5th Cir. 1993) (en banc) (treating "the issue as a question of fact, allowing aggregation of different minority groups where the evidence suggests that they are politically cohesive"), *with* Nixon v. Kent County, 76 F.3d 1381, 1393 (6th Cir. 1996) (en banc) (holding that "the Voting Rights Act does not support a conclusion that coalition suits are part of Congress' remedial purpose").

[205] Plaintiffs may not decide that coalition districts are in their interest. *See, e.g.*, Ross Ramsey, *Redistricting Experts Struggle to Fix Maps, Elections*, KUT (Feb. 12, 2012) http://kut.org/post/redistricting-experts-struggle-fix-maps-elections/ [http://perma.cc/82PK-P2L9] (describing the "factions within factions on both sides of the courtroom" in an earlier stage of Texas's current litigation).

[206] Bartlett v. Strickland, 556 U.S. 1, 17–18 (2009).

[207] *See LULAC, Council No. 4434*, 999 F.2d at 864 (expressing suspicion that purported coalition districts are merely "transitory unions rooted in political expedience").

[208] *E.g.*, Rollins v. Fort Bend Indep. Sch. Dist., 89 F.3d 1205, 1216 n.21 (5th Cir. 1996) (approving the district court's finding that the statistical evidence did not show cohesion and that "[n]o concrete, reliable, or credible evidence was presented at trial that Hispanic and African-American communities work together to accomplish common goals"); Brewer v. Ham, 876 F.2d 448, 453 (5th Cir. 1989) (finding that black, Hispanic, and Asian plaintiffs' "lack of statistical evidence of inter-minority political cohesion" and of political cooperation doomed their Section 2 claim against the school board in Killeen, Texas).

[209] *See Rollins*, 89 F.3d at 1214–15 (finding that while not required under existing law, statistical analysis may be the only way to effectively compare the impact of bloc voting with other factors affecting voting in a geographic area); *Brewer*, 876 F.2d at 453–54. *See also* Campos v. City of Baytown, 840 F.2d 1240, 1245–48 (5th Cir. 1988) (finding that plaintiffs had won the battle of statistical experts on the issue of cohesion).

[210] 548 U.S. 399, 432–35 (2006).

[211] *Id.* at 435.

persuade courts that the coalition's voting cohesion is genuine and durable. Showing also that those common needs have yielded demonstrable cooperation in pursuit of common goals would be even more persuasive.[212]

Plaintiffs then can argue that Justice Kennedy's concern in *Bartlett* about the tension between the first and third *Gingles* requirements is not applicable to minority-coalition districts. It troubled Justice Kennedy that a minority group would rely on white support while claiming to be submerged in a polarized white majority.[213] Under a minority-coalition claim, each minority group would rely on the others, not necessarily on crossover white votes. It is entirely plausible that multiple minority groups could each face submergence by a majority voting bloc if they did not collaborate with one another.

After clearing the *Gingles* threshold requirements, plaintiffs will then have to pass the *Gingles* totality analysis, in which the trial court weighs the history of discrimination in the area, the material effects of past discrimination, and the presence of racial appeals, among other factors.[214] Evidence of analogous past and present discrimination will be especially important for minority-coalition plaintiffs, given Fifth Circuit suspicion that coalitions are mere "ephemeral political alliances," not "cohesive political units joined by a common disability of chronic bigotry."[215] Showing comparable histories of discrimination and present effects might enable minority-coalition plaintiffs to defeat the suspicion that simple partisan expediency underlies their lawsuit.

Plaintiffs will be aided in this effort by the Fifth Circuit's recent finding that Texas's voter ID law has had a disparate impact on black and Latino voters due to similar histories of state-sponsored discrimination and the continuing effects thereof.[216] The Fifth Circuit also allowed that the record could support a finding of intentional discrimination against minority voters, and on remand, the district court might well make that determination.[217] Such a determination would lend considerable credence to a coalition district claim after the next census.

It is impossible to predict the composition of the Supreme Court by the time that a minority-coalition case arising from the 2020 Census

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[212] *Cf. Rollins*, 89 F.3d at 1216 n.21 (faulting plaintiffs for not demonstrating such cooperation).
[213] Bartlett v. Strickland, 556 U.S. 1, 16 (2009). *See supra* Part II–B (explaining the dubiousness of this concern).
[214] *See* Senate Report factors, *supra* note 158.
[215] LULAC, Council No. 4386 v. Midland Indep. Sch. Dist., 812 F.2d 1494, 1504 (5th Cir. 1987) (Higginbotham, J., dissenting), *withdrawn and aff'd on other grounds*, 829 F.2d 546 (5th Cir. 1987). *See also* LULAC, Council No. 4434 v. Clements, 999 F.2d 831, 864 (5th Cir. 1993) (en banc) (Higginbotham, J.) (reiterating those concerns but now in the majority opinion).
[216] Veasey v. Abbott, 830 F.3d 216, 250–51 (5th Cir. 2016) (similar disparate impact); *id.* at 259 (similar histories and legacies).
[217] *Id.* at 237–43.

would reach the Court, but in the absence of substantial changes to the Court's members and doctrine, plaintiffs will also need to allay the concern about simplistic race-based assumptions that drove Justice Kennedy's decisions in *LULAC* and *Bartlett*.[218] A careful showing that minority groups form an authentic and cohesive community of interest is needed to overcome the suspicion, now entrenched in precedent by the *Shaw–Miller* cases, that Section 2 claims arise from the offensive assumption that all minority groups "think alike, share the same political interests, and will prefer the same candidates at the polls."[219]

Plaintiffs can effectively rebut this concern and turn it in their favor by arguing that a blanket prohibition on minority-coalition claims would itself make impermissible race-related assumptions.[220] To bar minority-coalition claims categorically would be to assume that different minority groups could never form a community of interest or experience the same harms from discrimination.[221] That is, a categorical rule would hold that racial identification signifies immutable differences between minority groups.[222] This cannot be what the Constitution requires. Further, such a categorical rule would require minority groups to seek separation from one another in order to gain the protection of Section 2.[223] This also cannot be what the law requires.

The Supreme Court's interpretation of the VRA nevertheless puts potential coalition plaintiffs in a bind. One scholar suggested that the Court refused to preserve Texas's Twenty-Fourth District in *LULAC* because of a "judicial preference for electoral competition under the VRA."[224] On this view, the Court perceived that the black voters supporting Democrat Martin Frost did not feel free to challenge him in party primaries.[225] These black voters did not compete because they were cowed by the fear of losing the seat altogether.[226] Whatever one thinks of this theory,[227] if it is true that the lack of political contestation doomed the effort to preserve the Twenty-Fourth District, future plaintiffs should try to show robust contestation within the coalition of minority groups.

But such an effort would conflict both with the *Shaw–Miller* principles and with the Fifth Circuit case law on coalition claims. If it is suspected that the drawing of coalition districts depends on odious

[218] *Supra*, Parts II–A and II–B.
[219] Ho, *supra* note 195, at 431 (quoting Shaw v. Reno, 509 U.S. 630, 647 (1993)).
[220] *Id.* at 434.
[221] *Id.*
[222] *Id.*
[223] *Id.*; Haygood, *supra* note 164, at 15.
[224] Kang, *supra* note 125, at 738.
[225] *Id.* at 798–99.
[226] *Id.*
[227] The plurality opinion overlooked considerable evidence that the district's black voters were genuinely ardent supporters of Frost. LULAC v. Perry, 548 U.S. 399, 489 (2006) (Souter, J., concurring in part and dissenting in part).

assumptions that all minorities "think alike," the necessary proof is that the minorities bringing the lawsuit do genuinely share experiences, needs, interests, and goals. Showings of intragroup dissension and debate, however nice a sign of "political vibrancy,"[228] would be counterproductive to that aim. The grouping of meaningfully different people based on superficial similarity is flatly contrary to the *Shaw–Miller* principles and to *LULAC*'s invalidation of Texas's Twenty-Fifth District. Likewise, evidence of dissension and disagreement within the coalition has often inhibited the required showing of minority political cohesion in Fifth Circuit cases.[229]

As noted above, Section 2 plaintiffs will not always decide that it is in their interest to seek minority-coalition districts. To the extent that they do, the threshold requirements for Section 2 claims—shaped and constrained by the principles of the *Shaw–Miller* jurisprudence—necessitate a focus on commonality. As *LULAC*'s treatment of Texas's Twenty-Fourth demonstrates, even a persuasive showing of common history, preference, and behavior may not be enough. But it is likely the only course.

Conclusion

Through the many twists and turns in the life of the VRA, its scope and strength have varied. In *LULAC* and *Bartlett*, the concerns expressed in the *Shaw–Miller* jurisprudence exerted an important influence on the interpretation of the VRA, narrowing its scope and sapping its strength. As the Supreme Court's composition and the country's demographics change, it is difficult to predict the law's fate with much confidence. But under Section 2, as interpreted by *Bartlett* and *LULAC*, fewer plaintiffs can lay claim to Section 2's protection, and those plaintiffs will have to overcome the perception that offensive or simplistic racial assumptions underlie claims of minority vote dilution. Coalition plaintiffs in particular will have to demonstrate concretely and persuasively their common experience of discrimination and their shared needs and interests. If they cannot, Section 2 will continue to be curtailed, rendering minority groups vulnerable as inimical mapmakers try to stem the tide of demographic change and minority voting strength.

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[228] Kang, *supra* note 125, at 791.

[229] *Supra*, notes 207–09 and accompanying text. *See also* Overton v. City of Austin, 871 F.2d 529, 540 (5th Cir. 1989) (ruling that "ample evidence in the record supports the trial court's finding that the wide-open and vigorous Austin political system is not manipulated by any one group, and is certainly not manipulated for racial reasons"); *id.* at 544 (Jones, J., concurring) (arguing that despite evidence of cohesion among black voters and among Mexican-American voters, the record belied claims of cohesion between the two groups).